TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 83

MERION CRICKET CLUB, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 22, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN PENNSYLVANIA

DOCKET ENTRIES

Feb. 6, 1939. Complaint, filed.

Feb. 6, 1939. Summons exit.

Feb. 10, 1939. Summons returned: "on Feb. 7, 1939, served" and filed.

Apr. 25, 1939. Appearance of J. Cullen Ganey, Esq., for defendant, filed.

May 23, 1939. Answer filed.

Aug. 8, 1939. Stipulation of counsel amending complaint filed.

Aug. 11, 1939. Order to place case on Trial List filed.

Dec. 5, 1939. Trial by the Court.

Dec. 11, 1939. Defendant's motion for judgment filed.

Dec. 11, 1939. Defendant's requests for findings of fact and conclusions of law filed.

Dec. 26, 1939. Stenographer's transcript of hearing on Dec. 5, 1939.

Jan. 26, 1940. Opinion, Kalodner, J., finding verdict for defendant and granting judgment, filed.

[fol. 2] Jan. 26, 1940. Judgment for defendant, with costs, filed. 1-27-40 Noted & Notice mailed.

Feb. 1, 1940. Defendant's bill of costs filed.

Apr. 24, 1940. Plaintiff's notice of appeal filed. 4/25/40 copy to J. C. Ganey, U. S. Atty.

Apr. 24, 1940. Bond for costs sur appeal in $250, with Royal Indemnity Co., surety, filed.

Apr. 24, 1940. Copy of Clerk's notice to U. S. Circuit Court of Appeals filed.

July 19, 1940. Plaintiff's designation of contents of record on appeal, filed.

July 19, 1940. Points on which plaintiff intends to rely, filed.

July 19, 1940. Petition to extend time for filing & docketing appeal filed.

July 22, 1940. Order of Court extending time for filing record on appeal to July 23, 1940 filed. 7 23 40. Noted & Notice mailed. Copy to C. C. A.

[fol. 3] In United States District Court

Complaint—Filed February 6, 1939

1. The action arises under the Revenue Act of 1928, Act May 29, 1928, C. 852, § 413, 45 Stat. 864, U. S. C. Title 26 § 950; and the Act of February 24, 1925, C. 309, 43 Stat. 972, U. S. C. Title 28, § 41, as hereinafter more fully appears.

2. Plaintiff is a non-profit corporation organized and existing under the laws of the State of Pennsylvania. It is a social, athletic and sporting club located at Haverford, Pennsylvania.

3. The by-laws of plaintiff during all the times hereinafter set forth provided for the payment of club dues by the members, and plaintiff has regularly collected the dues tax on all said club dues and paid them to the Collectors of Internal Revenue.

4. Plaintiff, during all the times hereinafter set forth, has owned three grounds, two of them equipped with large club buildings. In these grounds and buildings plaintiff furnished numerous social and athletic facilities and rendered numerous services for the use of its members. Certain of these facilities and services were furnished to the members without special charge, and for certain other of them the members were required, if and when they desired to use them, to pay special fees in addition to the club dues.

5. Plaintiff, during all the times hereinafter set forth, owned and operated two 18-hole golf links and the by-laws of plaintiff provided that members who desired to play golf might obtain the privilege of playing golf for the year by the payment of a special annual golf fee, payable in two installments. The by-laws provided that before the end of each calendar year, each member exercising the golf privilege was given the option of terminating the privilege at the [fol. 4] end of the calendar year or of continuing it for the next year.

6. The amounts of said annual golf fees were as follows:

Men 21 years of age and over	$110.00
Non-resident	50.00
Juniors (under 21 years)	30.00
Women 21 years of age and over	50.00
Women under 21 years of age	30.00

7. On the demand of the Bureau of Internal Revenue, plaintiff collected from certain of its members the dues taxes on golf fees paid by them from July 1, 1931 to June 30, 1935, and paid the amounts so collected to the Collectors of Internal Revenue for the First District of Pennsylvania.

8. The names of said members, the amounts so collected from each of them, the dates when said amounts were paid to the said Collectors, and the total for each member, are set forth in "Exhibit A", attached hereto and made a part hereof. The aggregate amount was $18,690.29.

9. The said Collectors to whom the said taxes were so paid between July 1, 1931 and April 7, 1935 are each either dead or not in office as Collector of Internal Revenue at the present time, and the aggregate amount so paid to them between said dates was $641.67.*

10. Plaintiff is advised, believes and so avers that said golf fees were not club dues under the meaning of the Revenue Acts in such case made and provided.

11. A claim for refund of said amounts was duly filed by plaintiff and was rejected by the Commissioner of Internal Revenue on February 17, 1937.

[fol. 5] 12. Plaintiff brings this action on its own behalf, and on behalf of its members in accordance with the provisions of the Revenue Act and the Regulations appertaining thereto.

13. Plaintiff demands a judgment in its favor against defendant for $18,690.29 and interest.

(Sgd.) John Lewis Evans, Attorney for Plaintiff,
1930 Land Title Building, Philadelphia.

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* Amended to read $18,048.62.

EXHIBIT "A" TO COMPLAINT

(Record, p. 6)

Name of Member	Amount Collected from Member	Date Paid to Collect	Total
Hugh L. Adams	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
	5 50	2/16/33	
	5 50	8/22/33	
	5 50	2/17/34	
	5 50	8/17/34	
	5 50	2/14/35	49 50
David R. Albright	1 83	12/23/33	
	5 50	2/12/34	
	5 50	8/17/34	
	5 50	2/14/35	18 33
Frank C. Anderson	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
	5 50	7/18/33	
	5 50	8/22/33	33 00
Wm. Downs Anderson	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
* * * * * *			
[fol. 6]	5 50	2/16/33	
	5 50	8/22/33	
	5 50	2/17/34	
	5 50	8/17/34	
	5 50	2/14/35	49 50
Roscoe Tate Anthony	5 00	8/12/31	
	2 50	2/ 9/32	
	2 50	8/10/32	10 00
Wm. M. Armistead	11 00	8/12/31	
	5 50	2/ 9/32	
	5 50	8/10/32	
	5 50	2/16/33	
	5 50	8/22/33	
	5 50	2/17/34	
	5 50	8/17/34	
	5 50	2/14/35	49 50
Wm. L. Austin, Jr.	11 00	9/15/31	
	5 50	5/ 4/32	
	5 50	1/13/32	22 00
* * * * * *			
John N. Adams	2 75	6/10/35	2 75
W. A. Barrows, 3rd	1 83	6/10/35	1 83
George E. Bass	5 50	4/13/35	5 50
James Carstairs	5 50	2/14/35	5 50
Dr. Harold W. How	1 83	7/11/35	1 83
Dr. Jacob J. Kohlhas	5 50	2/14/35	5 50
Emmet J. Murphy	5 50	2/14/35	5 50
Col. Charles R. Sanderson	3 00	4/13/35	3 00
Robert R. Titus	5 50	6/10/35	5 50
H. A. Waterworth	5 50	6/10/35	5 50
Charles Newbold Welsh	5 50	2/14/35	5 50
Total			$18,690 29

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 23, 1939

And Now comes The United States by its attorney, J. Cullen Ganey, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and says that it is defendant in the above entitled cause, and that it has a just, true, complete and legal defense to the whole of plaintiff's claim of the following nature:

1. Admitted.

2. Admitted.

3. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 3 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

4. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 4 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

5. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 5 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

6. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 6 of the Complaint, and if material demands due proof thereof upon the trial of this cause.

7. Admitted.

8. Denied. Defendant says that the averments in paragraph 8 of the Complaint are irrelevant, immaterial, conclusions of law, and consequently need not be answered.

[fol. 8] 9. Denied. Defendant says the averments in paragraph 9 of the Complaint are irrelevant, immaterial, conclusions of law, and consequently need not be answered.

10. Denied. Defendant avers that the golf dues were club dues under the meaning of the Revenue Acts, and were properly and lawfully assessed and collected.

11. Admitted.

12. Admitted.

13. Demand admitted, liability denied.

Wherefore, it is denied that any sum is due and owing to plaintiff from defendant.

J. Cullen Ganey, United States Attorney; Thomas J. Curtin, Assistant United States Attorney.

[fol. 9] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Before Hon. Harry E. Kalodner, J.

Philadelphia, Pa., Tuesday, December 5, 1939.

Present: John Lewis Evans, Esq., for the Plaintiff. Thomas J. Curtin, Esq., and Donald M. Marran, Esq., Special Attorney, Tax Division, Department of Justice, for the Government.

MR. EVANS:

This action is brought to recover certain taxes collected by the Merion Cricket Club from its members and paid to the collector, the taxes being the ten per cent dues tax on the fees paid by the members of the club for the privilege of playing golf. A suit was brought by one of the members of the club to recover one payment of the tax. The case was tried before Judge Kirkpatrick and resulted in a judgment for the Defendant.

For reasons which I do not think necessary to state now, we decided it would be better to bring a new suit for the whole amount of the claim by the Merion Cricket Club, and this action has been brought, and involved twenty-five or thirty thousand dollars.

Now, it has been suggested that we should try this on the record in the Hardt case. There is everything in the record in the Hardt case necessary for each side, except the amount of the claim. The amount of the claim, of course, consists of a number of items which are stated in the com- [fol. 10] plaint, a great many items. And I had some corre-

spondence with the Government in regard to a shorter method of proving those figures, and nothing has been done in regard to that. Now, it is suggested that if we could try the case on the basis of the record in the Hardt case—I had an understanding that that would be done before the amount of our claim was proved. If Your Honor holds that we are entitled to recover, we would then take up with the Government the method of proving the amount of our claim. That would be a very laborious project, if we had to prove each item, because our books are kept—there are a great many short-cut arrangements in our books, and I thought it over pretty carefully, and we have got to prove each individual item, and in the complaint there are forty pages or something like that.

The Court. Was Judge Kirkpatrick's ruling ever taken up?

Mr. Marran: It wasn't, Your Honor.

Mr. Evans: No, it wasn't taken up. We did not take it up. But I believe, I think, Mr. Curtin will agree that it is a decision, of course, but is not res adjudicata, of course.

Mr. Curtin: No, it isn't res adjudicata, but the Government contends it is very persuasive in this Court, inasmuch as the claim for refund states the same grounds and the same facts as the case of Hardt v. McLaughlin.

Mr. Evans: Since the decision in the Hardt case, Judge Kirkpatrick decided a case, the Philadelphia Cricket Club, in favor of the Cricket Club.

Mr. Marran: On different facts, I might add.

Mr. Evans: Yes, on different facts. And it is our contention that the two decisions are not consistent.

(Discussion off the record.)

[fol. 11] Mr. Evans: I offer in evidence the record in the case of Frank M. Hardt v. M. S. MacLaughlin, Collector, September Term, 1931, Number 16376, including the stipulation of facts, portions of which were offered in evidence in that case, and the notes of testimony, it being agreed between the parties that this will constitute the record.

It is understood that with approval of the Trial Judge the case will be submitted to him without introducing evidence as to the amount of the claim, so that if the decision is in favor of the plaintiff, an opportunity will then be given to the plaintiff to prove the amount of his claim. If the de-

cision is in favor of the Government, no testimony need be taken as to the amount, the understanding being that if an appeal is taken and the Circuit Court of Appeals reverses such decision, the plaintiff will then have the opportunity of proving the amount of his claim.

Mr. Marran: The defendant offers in evidence the paragraphs of the stipulation which were offered by the Defendant in the case of Hardt v. MacLaughlin. The Defendant now offers in evidence the certified copy of the petition for refund filed by the Plaintiff in this case, and asks that it be marked Exhibit A.

(Certified copy of the claim for refund dated November 13, 1939, was marked Exhibit A.)

Mr. Graham: The Defendant offers in evidence a copy of the by laws of the club for the year 1931, and asks that it be marked Exhibit B.

(Book headed "The Merion Cricket Club 1931" was marked Exhibit B.)

Mr. Marran: And also a copy of the by-laws of the Merion Cricket Club for the year 1937 as Government's Exhibit C, as physical exhibits.

(Book bearing the heading "The Merion Cricket Club, 1937" was marked Exhibit C.)

[fol. 12] Mr. Evans: I move for judgment for the plaintiff for the amount claimed, and we will file requests for findings of fact and conclusions of law.

Mr. Marran: I move for judgment on the ground that the case of Hardt against MacLaughlin, and request the Court to find the facts as stipulated, and in the case of Hardt vs. MacLaughlin, which was made a part of the record in this case, and for the conclusions of law which will be filed later.

Excerpts from Transcript of Testimony in Hardt v. McLaughlin

(U. S. D. C. for E. D. of Pa., September Term, 1931, No. 16376; Record, p. 16)

Before Hon. William H. Kirkpatrick, J.

Philadelphia, Pa., Monday, June 17, 1935.

Present: John Lewis Evans, Esq., for Plaintiff. Charles D. McAvoy, Esq., United States Attorney, and Donald J.

Marran, Esq., Special Assistant to the Attorney General, for Defendant.

* * * * * * *

Mr. Evans: I offer Paragraphs 1 to 17, inclusive.

[fol. 13] (Paragraphs 1 to 17, inclusive, of the stipulation of facts read:

"Stipulation of Facts

It is hereby stipulated and agreed, by and between the parties in the above entitled case, and each of them, by their respective attorneys, that the following facts, together with exhibits hereto annexed, which are made a part hereof, shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true; and provided further, that either party hereto may object to the receipt in evidence of any or all of the facts set out herein by appropriate objection as to admissibility.

1. Defendant, J. L. MacLaughlin, was Collector of Internal Revenue for the First District of Pennsylvania from June 1, 1928, to June 11, 1932, and William J. Kyle is the present Acting Collector.

2. Plaintiff is, and has been since about October 1, 1919, a Family Member of the Merion Cricket Club, hereinafter called the Club, a social and athletic club of Haverford, Pennsylvania, and since said date has been exercising the privilege of playing golf at the Club, and has paid to the Club the annual amounts required to be paid by persons exercising said golf privileges.

3. On or about January 16, 1931, plaintiff paid to the Club one-half of the annual payment due the Club for golf privileges for the year 1931, the amount of such payment being $55.00. On or about July 2, 1931, plaintiff paid to the Club the second one-half of the annual payment due the Club for golf privileges for the year 1931, the amount of such payment being $55.00.

4. On or about May 28, 1931, plaintiff paid to the Club $5.50 as the dues tax on said payment of $55.00 made by

[fol. 14] plaintiff to the Club on January 16, 1931, as one-half of the annual amounts due the Club for golf privileges for the year 1931. The Club on or about June 17, 1931, paid said tax of $5.50 to the defendant herein.

5. On or about June 20, 1931 plaintiff filed with the Commissioner of Internal Revenue a claim for refund of said tax of $5.50. On August 26, 1931, the Commissioner of Internal Revenue rejected said claim for refund, and no part of said $5.50 has been repaid to the plaintiff.

6. A booklet was issued by the Club under date of April 1, 1931, which contains the charter, by-laws and house rules of the Club existing at the time of the plaintiff's payment of the tax hereinbefore referred to; also contains a list of the members and history of the Club. All or any part of said booklet may be introduced in evidence by either party hereto. Said by laws contain the following provisions:

Article I

Membership

Section 1. There shall be the following classes of members:

1. Proprietary Members. Any person heretofore or hereafter duly elected to membership, who is the holder of stock of the Haverford Land and Improvement Company to the par value of $1000 shall be a Proprietary Member and as such shall be entitled to all the privileges of the Club, without the payment of entrance fee, annual dues or assessments, and may obtain from the Treasurer cards of admission for the female members of his immediate family, which cards of admission shall entitle the holders at all times during the year for which they are issued to the privileges of the grounds and of those parts of the Main Clubhouse to which women may be admitted; and the sons, under the age of sixteen years, of all such members shall have the privileges of Junior Members free of charge.

[fol. 15] If such holder of stock be under the age of twenty one years, he shall be entitled only to those privileges which are accorded to other persons of his age.

Upon the transfer of his stock, such member shall lose the privileges herein granted, and shall be placed in any other class of membership he may choose and to which he is

eligible, without payment of an entrance fee. He shall, however, be liable to the dues payable by such class.

If the transferee of such stock is a member of the Club, or shall be duly elected to membership, he shall be subject to all the terms of this section. Women are eligible to Proprietary and Honorary, but not to any other class of membership.

The cards of admission which a Proprietary Member is entitled to obtain from the Treasurer for the female members of his immediate family, shall be issued to the following persons only:

First.—The wife and the unmarried daughters of such member.

Second.—The mother and the unmarried sisters of such member, if his father is not living.

Third.—The mother-in-law and the unmarried sisters-in-law of such member, if his father-in-law is not living.

Fourth.—All other unmarried women who are related to the member.

Such persons must be a part of the same family and reside permanently in the same house with the member, and have no other home.

2. Life Members, who shall have all the privileges of the Club without the payment of any annual dues or assessments. Any member not indebted to the Club, and any person duly elected to membership, who shall pay into the treasury of the Club the sum of $500 in cash, or in evidence of Club indebtedness to that amount, or in bonds to that [fol. 16] amount charged on real estate leased by the Club, shall thereby become entitled to all the privileges of the Club for the term of his natural life, without further payment of annual dues or assessments, and shall receive a certificate to this effect, signed by the President and Treasurer, and having the corporate seal affixed, attested by the Secretary. Said life Membership shall not be transferable in any manner whatsoever. If such Life Member be under the age of twenty-one years, he shall be entitled only to those privileges which are accorded to other persons of his age.

(Amendment of December 5, 1925.) The class of Life Membership is hereby abolished and no one shall hereafter

become a Life Member, provided that this amendment shall not affect the rights of any persons who were Life Members prior to March 11, 1892, known as Old Life Members.

3. Family Members, who shall be at least twenty-one years of age and shall be entitled to all the privileges of the Club: provided, that a married man under the age of twenty-one years may become a Family Member. Upon payment of the first installment of their annual dues they may obtain from the Treasurer cards of admission for the female members of their immediate families, which cards of admission shall entitle the holders at all times during the year to the privileges of the grounds and of those parts of the Main Club House to which women may be admitted, but such privileges shall not include the use of the Main Grounds for tennis, hockey or any other athletic purpose, for which use such women shall pay the annual fees provided in Article II, Section 2, 1. Those women who do not pay said fees may use the grounds for such purposes not more than four times a year upon payment of the usual ground fee. Such cards shall not be transferable, and shall be subject to revocation in case of non-payment of second installment of annual dues.

The cards of admission which a Family Member is entitled to obtain from the Treasurer for the female members [fol. 17] of his immediate family shall be issued under the same rules as provided in similar cases for Proprietary Members.

4. Senior Members, who shall be at least twenty-one years of age, and shall be entitled to all the privileges of the Club. Upon payment to the Treasurer of the additional annual dues for the current year, they may become Family Members.

5. Playing Members, who shall be at least twenty-one years of age, and shall have all the privileges of Senior Members, except the privileges and use of the Main Club House and Golf House. Playing Members of twenty-five years and over shall have the use of such House privileges as the Board of Government shall permit.[1] Playing Members holding that class of membership prior to November 1,

[1] By resolution of November 27, 1929, the Board granted to them the same privileges as those possessed by Senior Members.

1929, may be transferred, upon application, to Family or Senior membership, without payment of the additional entrance fee; provided, that application for such transfer is made on or before December 31, 1932. On and after January 1, 1930, no one shall be elected to Playing Membership who has reached the age of twenty five years, and an election or a transfer from Active Membership after November 1, 1929, shall be subject to the condition that such membership shall terminate when the member reaches the age of twenty five years; he may, however, transfer at that time to Family or Senior membership upon payment of the additional entrance fee, provided, that in case he had been transferred from Active membership the payment of an entrance fee is not required. Playing Members may apply for transfer to the Family or Senior class, and they shall have precedence of applicants for admission to the Club. Upon transfer they shall pay the additional dues for the current year and the difference between the entrance fee [fol. 18] of Playing Members and the entrance fee of the class of membership to which they are transferred.

6. Active Members, who shall be over sixteen and under twenty-one years of age, and shall have all the privileges of Playing Members under the age of twenty five years, except the right to vote and hold office. When they reach the age of twenty-one years they may be elected Family or Senior Members if there is a vacancy in those classes, or if not, they may be elected Playing Members, to remain as such until a vacancy occurs in the Family or Senior class, when they shall at once be transferred to the same on their original application, if they so desire, without the expiration of the six months' period of membership in the Playing class. They shall have precedence of applicants for admission to the Club. When so elected or transferred, they shall pay the additional dues for the current year, but no entrance fee.

7. Junior Members, who shall be boys under the age of sixteen years. They shall have the use of such portion of the grounds and of such implements and of such quarters as may be assigned to them, and shall be entitled to play upon the elevens of the Club, but shall not be eligible to office or have any right to vote. When they reach the age of sixteen years they shall become Active Members, and be charged with dues as such.

8. Army and Navy Members, who shall be Officers of the Army and Navy of the United States in active service, and shall be entitled to all of the privileges of the Club, except the right to vote. Upon payment of their first six months' dues, they may obtain from the Treasurer cards of admission for their wives and unmarried daughters, which cards of admission shall entitle the holders at all times during the year to the privileges of the grounds and of those parts of the Main Club House to which women may be admitted. Such cards shall not be transferable, and shall [fol. 19] be subject to revocation in case of non-payment of subsequent dues.

9. Non-Resident Members, who shall reside at least fifty miles from the Club Grounds, shall be at least twenty-one years of age, and shall be entitled to all the privileges of the Club, except the right to vote.

10. Honorary Members. The Club in Annual or Special Meeting assembled, may, on nomination of the Board of Government, elect any person to Honorary Membership; provided, that notice of the nomination of the Board shall be given in the call for the meeting.

Honorary Members shall be entitled to all the privileges of the Club, including the right to vote, and to obtain from the Treasurer for the female members of their immediate families, cards of admission similar to those issued to Family Members and carrying similar privileges. Honorary Members shall not be subject to the payment of annual Club dues or of annual Golf fees for themselves.

Sec. 2. 1. The total of the Family and Senior Memberships shall not exceed 1500, any increases over 1350 to be made by the Board of Government in its discretion from time to time.[2]

The total of the other classes of membership shall not be limited.

2. The number of members who shall be admitted to the exercise of golf privileges, exclusive of Playing, Active and Junior Members, shall not exceed 400[3] or such greater

[2] Down to date of publication, no increases have been made.

[3] By resolution of June 27, 1917, the Board raised this number to 540.

number as the Board of Government shall from time to time prescribe: Provided, That any person who is a member of the Club at the time of the adoption of this By-Law, [fol. 20] December 7, 1912, and who has remained a member continuously until the date of his obtaining golf privileges, shall be entitled at any time, irrespective of this limitation, to exercise golf privileges upon the payment of the regular golf fees. Playing, Active and Junior Members and women shall not be permitted to exercise golf privileges, except in such numbers and on such terms as the Board of Government shall from time to time prescribe.[4]

3. Members of the Club, and women having the privileges of the Club, desiring to play golf, shall pay, in addition to the other dues or sums for which they are annually liable, further fees for the privilege of playing golf; and in case of non-payment of the same, such persons shall be subject to the same penalties as provided for the non-payment of dues. Any person so electing to play golf in any year shall be liable for fees for the succeeding year, unless notice of a desire to withdraw shall be given to the Treasurer before December 31st of any year.

3a. A member of the Club while he is the registered owner of one thousand dollars at par of the stock of the Merion Cricket Club Golf Association shall be entitled to the use of the Golf facilities of the Club without payment of Golf fees.

* * * * * * *

Sec. 4. 1. All applications for membership shall be submitted in writing to the Committee on Membership, by two members of any class of membership, except Junior. The applicant must be personally known to both proposers. The Committee shall cause the names of candidates to be posted on the bulletin boards in the Club-houses, for two weeks before action shall be taken.

[fol. 21] 2. The Committee shall meet at least once a month at a stated time and place, notice of which shall be posted on the bulletin boards in the Main Club-house. Four

[4] At date of publication, Playing Members are not permitted to play golf; Non-resident, Active and Junior Members may play, with no limit on the numbers.

members shall constitute a quorum of the Committee, but the negative vote of two members shall be sufficient to exclude any candidate from membership.

3. Candidates elected by the Committee, shall upon payment of the required entrance fee and dues for the current year, or portion thereof, become members of the Club. The election of any candidate shall be void if he fail to make such payment within thirty days after the notice of his election has been mailed to the address stated in the application.

Sec. 5. 1. All resignations must be presented in writing to the Secretary, and shall be accepted by him if the member is not indebted to the Club. All resignations must be presented before the thirty-first day of December of any year, otherwise the member shall be liable for the entire dues of the following year.

* * * * * * *

Article II

Revenue

Section 1. An entrance fee of two hundred and fifty dollars shall be payable by all persons elected as Family or Senior Members: provided, that such persons, if under the age of 30 years, shall have the option of paying said amount in full upon election, or, of paying one hundred dollars at that time, seventy-five dollars at the expiration of one year thereafter and seventy-five dollars at the expiration of two years thereafter.

An entrance fee of twenty-five dollars shall be payable on election by all persons elected as Playing Members, except those transferred from Active Membership (Art. I, Sec. 1, 6).

[fol. 22] No entrance fee shall be paid by Army and Navy Members.

An entrance fee of fifty dollars shall be paid by Non-Resident Members when first elected members of the Club.

A golf entrance fee of one hundred dollars shall be payable when any man over twenty-one years of age or any Non-Resident Member shall be admitted, to the exercise of golf privileges: provided, that the golf entrance fee shall not be payable by any person who is a member of the Club at the time of the adoption of this amendment to the By-

Laws, December 1, 1923, and who has remained a member continuously until the date of his obtaining golf privileges.

Sec. 2. 1. The annual dues shall be as follows:

Family Members	$120.00
Senior Members	100.00
Playing Members 30 years of age and over (Elected prior to November 1, 1929)	100.00
Playing Members from 25 to 30 years of age (Elected prior to November 1, 1929)	75.00
Playing Members from 21 to 25 years of age	50.00
Active Members	30.00
Junior Members over the age of 12 years	10.00
Non-Resident Members	50.00
Annual amount for women with no relative in the home who is eligible to Family Membership (no payment to be required of them for Tennis, Hockey or other athletic purpose on the Main Club Grounds)	60.00
Annual fee to be paid by women for Tennis, Hockey or other athletic purpose on the Main Club Grounds (Art. I, Sec. 1, 3):	
Women 21 years of age and over	$30.00
Women 16 to 21 years of age	20.00
Women from 12 to 16 years of age	10.00

1a. The annual fees for Golf privileges shall be as follows:

Men 21 years of age and over	$110.00
Non-Resident	50.00
Juniors (under 21 years)	30.00
Women 21 years of age and over	50.00
Women under 21 years of age	30.00

[fol. 23] 2. The annual dues and fees of members and of women shall be payable in equal installments, one on the first day of January and one on the first day of July in each year, except those of Army and Navy Members which shall be payable as provided in Article I, Section 1, 8. Persons elected to membership, or admitted to Golf privileges, after July first of any year shall pay only one-half of the annual dues or fees for the current year.

* * * * * * *

3. Every member, on payment of his annual dues or of the portion thereof for which he may be liable, shall receive

from the Treasurer a card of admission, upon which shall be printed the privileges of the class of membership to which he belongs.

7. Beginning with the year 1923, the Club furnished the following form of application for the use of members desiring to obtain golf privileges:

Secretary, 19

The Merion Cricket Club:

I desire to avail myself of the Golf Privileges of the Club from until I advise you in writing to the contrary, on or before December 31st of any year.

Mr.
Mrs.
Miss (Date of 21st birthday)

Upon receipt of said form of application, daly filled out, it was the practice of the Chief Clerk of the Club to enter the name of the applicant on the list of those persons entitled to golf privileges and charge the person with the appropriate entrance fee and annual payment.

8. Members of the Club exercising golf privileges were entitled to use the golf links as often as they desired, with- [fol. 24] out further charge, and were also entitled to extend the courtesy of the golf courses of the Club to their wives or guests in the following manners:

(1) To take the wife or guest with them to play golf not more than four times in a year, and

(2) To request the usual ten-day card under Article IV, Section 2, page 48, which reads as follows:

At the written request of a member, the Board of Government may, at its discretion, extend an invitation for ten days to a person residing or having a place of business more than twenty-five miles from Haverford. Such invitations shall confer only the use of those houses and grounds of which the member himself has the use.

Such invitation may be renewed by the Board for a further period of ten days, but shall not be granted a second time to the same person until three months shall have elapsed after the expiration of the invitation or its renewal.

The issuance of such invitation shall be noted in a book provided for that purpose.

9. No members of the Club have been permitted to play golf at the Club unless they paid the annual amount fixed by the by-laws therefor; except that members on the waiting list for golf privileges were permitted limited use of the golf courses upon payment of daily green fees fixed by the Club. The present "Schedule of Green Fees" is as follows:

Waiting List—$3.00 per day except on Saturdays, Sundays and holidays during the months of May, June and September. On those days the charge will be $5.00 per day.

10. When no vacancies existed in the list of members entitled to golf privileges, the Secretary of the Club sent newly elected members a card reading as follows:

[fol. 25]

Founded 1865

The Merion Cricket Club

Haverford

Dear Sir:

The Board of Government has directed that attention be called to the fact that there are no vacancies in the list of members entitled to golf privileges, and that new members applying for the privileges of the golf course can obtain such privileges only in the order in which their applications are received and as vacancies occur.

Very truly yours, Wm. J. Serrill, Secretary.

11. The membership cards issued under Article II, Section 2, paragraph 3 of the By-laws do not contain any reference to whether or not the member is exercising golf privileges.

12. From 1919, when the plaintiff first began to exercise the golf privileges of the Club, until the present time, members have been permitted to play golf upon making an annual payment for the privilege in the same general method as in 1931. The only difference in the provisions of the By-laws concerning the playing of golf in force prior to 1929 and those in force subsequent to 1929, excluding changes in the amounts of the annual payment for golf privileges, is that prior to 1929 the annual payments were designated "golf dues" and subsequent to 1929 were designated "golf fees".

13. The report of the Board of Government of the Club dated February 6, 1932, showed that the total membership as of January 1, 1932, was 1,512 as against 1,718 as of January 1, 1931, and that the total number of persons exercising golf privileges as of January 1, 1932, was 831 [fol. 26] as against 1,043 exercising such privileges as of January 1, 1931.

14. The Income Statement of the Club for the year ended December 31, 1931, as shown by the Treasurer's Annual Report, is attached hereto as Exhibit 4, and made a part hereof. The amount paid for golf privileges during said year is designated in said statement as "golf fees".

15. In addition to golf the Club maintains facilities for the playing of the following organized sports by its members—cricket, tennis, association football, field hockey, skating, squash racquets, bowling billiards and pool.

16. The Merion Cricket Club has three pieces of property several miles apart:

a. The Main Grounds used for cricket, tennis, association football, and field hockey, and on which there are four buildings—(1) a large Clubhouse with locker rooms, squash courts, bowling alleys, billiards and pool tables, a restaurant, a ball room, sleeping rooms for members, servants' quarters and the usual rooms for social entertainment found in a large country club; (2) a building consisting entirely of sleeping rooms for members; (3) a small building containing lockers and dressing rooms for ladies; and (4) a large garage accommodating 35 cars.

b. The East Course on which there is an 18 hole golf course and a skating pond and a large Clubhouse with locker rooms, quarters for golf professionals and caddies, a restaurant and the usual rooms for social entertainment found in a large country club.

c. The West Course on which is the second 18 hole golf course.

17. On December 30, 1925, the United States District Court, for the District of Massachusetts, gave judgment for the plaintiff in the case of Weld v. Nichols, 9 F. (2d) [fol. 27] 977, from which no appeal was taken. Shortly after the said Weld decision was rendered, the Bureau of Internal Revenue allowed certain claims for refund filed

by clubs which deemed their golf dues payments to be within the scope of that decision. However, since the decision in Foran v. MacLaughlin, 59 F. (2d) 158, (certiorari denied, 287 U. S. 637), no claims of such character have been allowed. On the 14th day of January, 1930, the General Counsel of the Bureau of Internal Revenue prepared an opinion which was published in Internal Revenue Bulletin IX-2, pages 414-416. Said opinion of the General Counsel has been consistentiy adhered to and followed by the Commissioner of Internal Revenue since its promulgation.")

Mr. Evans: If the Court please, I offer in evidence the letters from the Bureau dated October 6, 1930, May 4, 1931, and August 26, 1931 showing the positions that the Bureau took. Do you want to read those?

Mr. Marran: Yes, I would like to read them. (The letters were shown to Mr. Marran.)

Mr. Marran: Do you want to argue further?

Mr. Evans: No.

(Letter dated October 6, 1930, from the Collector, J. S. MacLaughlin, to Merion Cricket Club, with attached copy of letter dated September 27 1930, was marked Exhibit P-1. A copy thereof follows:

[fol. 28] EXHIBIT P-1

"(Stamped)
Oct 8 1930

Treasury Department

Internal Revenue Service

Philadelphia, Pa.

Office of the Collector

First District of Pennsylvania

U. S. Post Office Building

October 6, 1930.

EO-WJK

Merion Cricket Club, Haverford, Pa.

SIRS:

Enclosed herewith is copy of letter received from the Commissioner of Internal Revenue dated September 27,

1930, relative to the collection of tax upon dues and membership fees with respect to annual dues for golf privileges.

You will note that the Department has directed me to call your attention to the fact that a previous ruling has been reversed and that you should collect tax in the future based on the annual charges for golf as well as annual dues paid by the various classes of members of your Club.

Respectfully, (Sgd.) J. S. MacLaughlin, Collector.

LBP—Enc.

[fol. 29] Copy

Treasury Department

Washington

MT:M:WJR September 27, 1930.

Collector of Internal Revenue,
Philadelphia, Pennsylvania.

Reference is made to the question of the liability under Section 413 of the Revenue Act of 1928 and corresponding sections of previous Revenue Acts of the Merion Cricket Club, Philadelphia, Pennsylvania, for collection of tax on dues and membership fees with respect to annual dues for golf privileges.

This question was previously considered by the Bureau, and it was held that the annual dues for golf privileges were not subject to tax as dues or membership fees under the provisions of section 501 of the Revenue Act of 1926. However, subsequent to that time a similar case was referred to the General Counsel for a ruling as to the taxability in the light of the decision rendered by the court in the case of Weld v. Nichols of annual charges made to members of a club for golf privileges. The court stated in the case of Weld v. Nichols that the words "dues or membership fees" were meant to cover fixed and definite charges applicable to all members of each particular class of membership.

The General Counsel held that the rule which the court prescribed embodies two requisites which must be met before payments made by the club members may properly be

regarded as "dues or membership fees", within the meaning of the decision. First, the payment must be made in satisfaction of a fixed and definite charge, and, second, this charge must be applicable to all members of each particular class of membership. It would appear that fixed and definite charges of this character are those which members must pay periodically for the continuance of any particular class of membership.

[fol. 30] According to the by-laws on file, the regular dues in the Merion Cricket Club range from $5.00 to $100.00 per year for the various classes of members. The by-laws provide that the annual dues for golf privileges shall be $95.00 for men, $32.50 for men from 21 to 23 years of age, $32.50 for nonresident, $20.00 for juniors, $35.00 for women over 23 years of age, and $20.00 for women under 23 years of age. It appears, therefore, that when a member elects to play golf, he becomes a golf playing member liable to a fixed and definite annual charge, depending on the class of membership to which he belongs, as long as he remains a member in that class.

You are advised that the case has been taken up for reconsideration in the light of the ruling furnished by the General Counsel, and it is held that the annual charges of $20.00, $32.50, $35.00 and $95.00 made to members for the use of the golf links, together with the regular annual dues are properly subject to the tax imposed by section 413 of the Revenue Act of 1928 and corresponding sections of previous Revenue Acts. The club should be advised to the effect that the previous ruling has been reversed and should be instructed to collect tax in the future, based on the annual charges for golf as well as the regular annual dues paid by the various classes of members.

(Signed) R. M. Estes, Deputy Commissioner."

MBS

Letter dated May 4, 1931, from the Deputy Commissioner, R. M. Estes, to Bromley, Evans & Staples was marked Exhibit P-2. A copy thereof follows.

[fol. 31] EXHIBIT P-2

"Treasury Department

Washington

Office of Commissioner of Internal Revenue

Address reply to

Commissioner of Internal Revenue

and refer to

MT:M:WJR May 4, 1931.

Bromley, Evans & Staples,
701 Commercial Trust Bldg.,
Philadelphia, Pennsylvania.

Gentlemen:

Reference is made to the question of the liability of the Merion Cricket Club, Haverford, Pennsylvania, for collection of the tax imposed by section 413 of the Revenue Act of 1928, based on amounts paid for golf privileges.

It was held under date of September 27, 1930, that the annual charges made to members for the use of the golf links, together with the regular annual dues, are properly subject to tax as dues or membership fees. However, in view of the contentions made by you, the question was referred to the office of the General Counsel for a specific ruling.

In the case of Weld v. Nichols (9 Fed. 2d 977) the question under consideration was whether the payment by a club member of $7.50, representing an additional fee for the privilege of playing golf for six months, could properly be held subject to the tax imposed on club dues or membership fees. In commenting upon the meaning of the words, the court said:

"* * * It seems clear that in clause (b) the words in question must refer to definite obligations incidental to membership in the club. Presumably the same expression is used in the same sense throughout the section. If so, the words 'dues or membership fees', in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership. This seems to me to be the underlying intention of the section."

[fol. 32] In accordance with the decision of the court where payments for club privileges are fixed and definite in amount and must be paid by all members belonging to any particular class or sub-class of membership, or by all members generally, such payments are taxable as club dues or membership fees. Fixed and definite charges of this character are those which members must pay periodically for the continuance of any particular class of membership. If the periodical payments so required are applicable to all members of each particular class, the two conditions required for taxability under the court decision are complete.

The schedule of dues and fees adopted by the club on November 23, 1929, sets forth the annual dues for the different classes of members and provides that "The annual fees for golf privileges shall be as follows:

Men 21 years of age and over	$110.00
Non-Resident	50.00
Juniors (under 21 years)	30.00
Women 21 years of age and over	50.00
Women under 21 years of age	30.00"

The amounts of $110.00, $50.00, and $30.00, payable by males who are members of the club, are specified as "annual fees for golf privileges". They are fixed and definite and are payable annually by the members. It is considered that these features are sufficient to bring the payments within the taxing statute. It is held, after consideration of the evidence on file, that the annual fees for golf privileges payable by men members twenty-one years of age and over, by non-resident members, and by junior members, are properly subject to tax as dues or membership fees within the meaning of section 413 of the Revenue Act of 1928.

It appears that the women included in the above schedule obtain the privileges of the club by the payment of these charges but that they are not members of the club. Since the payments of $50.00 and $30.00 made by women are not [fol. 33] made by club members, it is held that they are not "dues or membership fees" within the meaning of the revenue laws.

The above ruling is substantially in accordance with the decision rendered by the General Counsel.

Respectfully, (Sgd.) R. M. Estes, Deputy Commissioner.

EGB
cc-Philadelphia, Pa."

EXHIBIT P-3

Letter dated August 26, 1931, from the Commissioner, David Burnet, to Mr. Frank M. Hardt, was marked Exhibit P-3. A copy thereof follows:

"Treasury Department

Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to

MT:M:LS
CI:S:26418

Aug. 26, 1931.

Mr. Frank M. Hardt, c/ Fidelity-Philadelphia Trust Co., Broad & Walnut Sts., Philadelphia, Pennsylvania.

SIR:

Reference is made to your claim for the refund of $5.50, representing tax alleged to have been erroneously paid for the month of May, 1931, on dues in the Merion Cricket Club.

It is contended that the tax in question was erroneously paid on the semiannual payment of $55.00 made to the club for the privilege of playing golf and that such fee is not [fol. 34] dues or membership fees within the meaning of section 413, Revenue Act of 1928.

In the case of Weld v. Nichols (7 Fed. 2d 977) the question under consideration was whether the payment by a club member of $7.50, representing an additional fee for the privilege of playing golf for six months, could properly be held subject to the tax imposed on club dues or membership fees. In commenting upon the meaning of the words, the court said:

"* * * It seems clear that in clause (b) the words in question must refer to definite obligations incidental to membership in the club. Presumably the same expression is used in the same sense throughout the section. If so, the words 'dues or membership fees', in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership. This seems to me to be the underlying intention of this section."

In accordance with the decision of the court where payments for club privileges are fixed and definite in amount and must be paid by all members belonging to any particular class or sub-class of membership, or by all members generally, such payments are taxable as club dues or membership fees. Fixed and definite charges of this character are those which members must pay periodically for the continuance of any particular class of membership. If the periodical payments so required are applicable to all members of each particular class, the two conditions required for taxability under the court decision are complete.

The evidence on file shows that the annual fees charged men 21 years of age and over for golf privileges are $110.00. Such fee is fixed and definite in amount and is payable annually by the male members. It is considered that these features are sufficient to bring the payment within the taxing statute. It has therefore been held that the annual fees for golf privileges payable by men members 21 years of age and over, are properly subject to tax as dues or mem- [fol. 35] bership fees within the meaning of section 413, Revenue Act of 1928.

The claim is therefore rejected in full.

Respectfully (Sgd.) David Burnet, Commissioner.

MBC.
cc-Philadelphia, Pa.")

DEPOSITION OF A. WINSOR WELD

Mr. Evans: I am going to offer that deposition. I offer in evidence the deposition of A. Winsor Weld. I will read the deposition:

* * * * * * *

First Interrogatory: State your name and place of residence.

Answer: A. Winsor Weld, 47 Suffolk Road, Chestnut Hill, Massachusetts.

Second Interrogatory: What office, if any, do you now hold in the Country Club of Brookline?

Answer: President.

Third Interrogatory: Were you the Plaintiff in the case of Weld vs. Nichols, Collector, reported in 9 Fed. (2d) page 977?

Answer: Yes.

Fourth Interrogatory: After the decision in said case, what action, if any, did the Country Club of Brookline take with regard to the dues tax on the golf fees previously collected by the Club from the members and paid to the Collector, and what was the result of such action?

Answer: We made claim for refund and received amount we had paid.

[fol. 36] Fifth Interrogatory: Since the said decision, has the Club collected from the members the dues tax on the golf fees?

Answer: No.

Sixth Interrogatory: What is the present amount of the semi-annual fee for playing golf at the Brookline Country Club?

Answer: Twelve dollars fifty cents. ($12.50)

Seventh Interrogatory: Since the said decision, what changes, if any, have been made in the By-Laws, Regulations and practices of the Club with regard to the manner of charging members for the privilege of playing golf?

Answer: No changes, except that the semi-annual amount has been changed from time to time.

Eighth Interrogatory: Since the said decision, have the Government officials made any demand upon the Club that the Club collect the dues tax on semi-annual golf fees?

Answer: No.

Ninth Interrogatory: Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer: No.

TREASURY REGULATION 43 (PART 2)

* * * * * * *

Mr. Evans: I offer in evidence Treasury Regulations 43 (Part 2) relating to Tax on Dues, revised September, 1924, [fol. 37] these being the regulations in effect at the time of the Weld case, calling attention particularly to the third

paragraph of Article 9, on page 10, which contains this sentence: "So, also are extra charges which are imposed upon members for the privileges of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

And also, Example 7 of the same article: "The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee."

I also call attention to the fact that in the Weld case —

Mr. Marran: No objection to the letters.

Mr. Evans: —the bill of exceptions was withdrawn March 23rd, 1926, and that in May, 1926, another revision of Regulations 43, Part 2 was published by the Treasury Department, in which, under Article 9, the provisions are just the same as the previous one, except those two sentences I have read have been deleted, thus bringing the regulations in agreement with the decision in the Weld case.

Now, I call your attention to the fact that in the stipulation it is stated that after the Weld case refunds were made to clubs where the facts were the same as in the Weld case.

I call Mr. Lesley. Mr. Lesley, will you take the stand?

[fol. 38] Robert W. Lesley, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Evans:

Q. Mr. Lesley, you are the President of the Merion Cricket Club and have been for twelve years?

A. About twelve years.

Q. Yes.

A. Between twelve and thirteen, I think.

Q. You have been a member of the club since 1880?

A. Correct.

Q. In the stipulation that we have agreed to, Mr. Lesley, the proprietary membership consists of any person duly

elected to membership who holds a thousand dollars stock of the Haverford Land and Improvement Company. Now, the Haverford Land and Improvement Company is the corporation which owns the main grounds?

A. Right.

Q. And that provision as to proprietary membership has been in the by-laws since 1892?

A. Since we started to build the house.

Q. Yes.

Mr. Marran: Your Honor, may I object to any question as to the proprietary membership of this club? The question purely involves Mr. Hardt, who is a family member of the club. The question is whether or not he is liable for club dues, or the tax.

The Court: I will take it subject to your objection, note the objection,——

Mr. Marran: Exception.

The Court: —and reserve the ruling.

[fol. 39] By Mr. Evans:

Q. This provides that a holder of a thousand dollars of stock of the Haverford Land and Improvement Company shall be entitled to all the privileges of the club without the payment of entrance fees, annual dues or assessments. Is that the provision in the lease from the Haverford Land and Improvement Company——

A. Yes.

Q. —to the Cricket Club?

A. Yes.

Mr. Evans: I offer in evidence the lease from the Haverford Land and Improvement Company to the Merion Cricket Club, dated April 1, 1892, with particular reference to paragraph 7, which I will ask the stenographer to copy. That provides in the same terms of the proprietary membership——

* * * * * * *

Seventh. The said Lessee hereby agrees that any present or future member of the said Merion Cricket Club who is the holder of stock of the said Lessor to the par value of one thousand dollars ($1,000) shall be entitled to all the

privileges of any of the members of said Club without the payment of entrance fee, annual dues or assessments and may obtain from the Treasurer of said Lessor, cards of admission for the female members of his immediate family; which cards of admission shall entitle the holders at all times during the year for which they are issued to the privileges of the ground and of those parts of the main Club House to which ladies may be admitted; and the sons of all such members under the age of sixteen years (16) shall have all the privileges of junior members of the said Lessee, free of charge. It being distinctly understood and agreed that such cards of admission shall be non-transferrable.

It Is Also further stipulated and agreed that should such holder of stock to the amount of one thousand dollars [tol. 40] ($1,000) as aforesaid, be under the age of twenty-one years (21) he shall be entitled to only such privileges as are accorded to other members of the said Lessee of his own age. Upon the transfer of his stock such member so transferring shall lose all the privileges herein granted and shall be placed in any other class of membership in said Cricket Club, to be selected by him and to which he is eligible without the payment of any entrance fee and such members shall from thenceforth be liable to all the dues payable by such class so selected by him, or in the event of a life membership being chosen to the payment of five hundred dollars ($500). If the Transferee of any such stock is a member of the Lessee or shall be duly elected to membership he shall be entitled to all the rights and privileges herein referred to and under and subject to all the terms and provisions of this section.

* * * * * * *

By Mr. Evans:

Q. Now, Mr. Lesley, the first golf course was acquired in 1896?

A. Right.

Q. And since that time how have the members been permitted to play golf on the course, in the same manner as in 1931?

A. As far as I know, yes.

Q. Yes, and they were required to pay an annual fee for the privilege of playing golf?

A. Always an annual fee.

Q. In 1931 how many proprietary members paid that annual fee for playing golf?

A. That I can't tell you.

Q. Didn't you look that up and put it on your notes?

A. Well, I suppose I did. The books will show it.

Q. Third paragraph from the bottom, the first page, on the first page, the third paragraph from the bottom.

A. I haven't got it here.

Q. No, it is the one above that, the third paragraph.

[fol. 41] A. Forty-three proprietary members.

Q. Forty-three proprietary members paid the golf fee in 1931?

A. Yes.

Q. Have the proprietary members always been required to pay the golf fee?

A. Certainly, certainly.

Q. Did you say yes?

A. Yes, sure.

Q. Yes. The club made a claim for refund of the taxes collected on the golf fee following the Weld case, did it not?

A. Following the decision of the Court.

(Mr. Evans showed a paper to Mr. Marran.)

Mr. Marran: Objection is offered to the evidence respecting this claim for refund of the Merion Cricket Club. They are different parties and it is a different tax year.

The Court: Well, I will make the same ruling and take it all subject to the objection.

Mr. Marran: Exception.

By Mr. Evans:

Q. Is that the notice of adjustment of claim which the court received from the Government, with a check for $19,460.83.

(The witness examined the paper.)

A. Yes, signed by the Deputy Commissioner.

Mr. Evans: I offer that in evidence.

(Notice of adjustment of claim for refund, dated March 13th, 1928, from the Deputy Commissioner to the Merion

Cricket Club was marked Exhibit P-6. A copy thereof follows:

[fol. 42] "TREASURY DEPARTMENT

Internal Revenue Bureau

Form No. 7801—Jan., 1922

Comptroller General U. S.

January 18, 1922

Washington, D. C., Mar. 13, 1928.

Notice of Adjustment of Claim for Refund

MT:M:LS.

		Schedule
Claim No. S-354544	District 1st Pa.	No. MTR-541

Merion Cricket Club, % P. S. Talbert, 1016 Munsey Building, Washington, D. C.:

Your claim for refund of tax on green fees erroneously or illegally collected, has been adjusted as shown below.

Claimed $19,593.90, Allowed $19,460.83, Rejected $133.07

Date of Payment Claim presented July 31, 1926. Various dates from August 31, 1923, to May 18, 1926.

The claim is allowed for $19,460.83 since an investigation has disclosed that this amount represents taxes on extra charges collected from members for the privilege of using the golf course.

It is, however, rejected for $53.49 for the reason that this amount is barred from recovery by the four year statute of limitations. The claim is also rejected for $79.58 since this amount represents taxes claimed in error.

Included in the inclosed check is interest in the amount of $4,267.49.

A check by the Disbursing Clerk of the Department for the amount refunded is forwarded herewith.

Respectfully, (Sgd.) R. M. Estes, Deputy Commissioner.

[fol. 43] cc-Merion Cricket Club, Haverford, Pennsylvania.

FG:LCG.

1. Amount of taxes paid by claimant during the period of the claim as certified by the collector	$
2. Correct tax liability for the claimant for the period involved	$
3. Amount of tax refundable	$
4. Amount of penalties and interest refundable	$
5. Total amount refundable	$
6. Interest computed on the total amount refundable	$
7. Total amount for which the payment will be made	$ ")

By Mr. Evans:

Q. In the stipulation it is stated that Article I, Section 1 of the By-laws commences: "There shall be the following classes of members:", followed by ten paragraphs telling the ten classes of membership. Were those introductory words in the By-laws in 1892?

A. I don't think so, I don't remember.

Q. Are those the By-laws of 1892?

(By-laws were shown to the witness.)

A. 1892, that is right.

By Mr. Evans:

Q. How does the Article I, Section 3 commence, the first clause in it, the first words?

A. "There shall be the following classes of members".

Q. Of members, and that is followed by the seven classes?

A. Yes, sir.

Q. Practically the same as those that we have now, in other words, we have added three classes of membership since 1892, and the others remained substantially the same?

[fol. 44] A. Right.

Q. Paragraph 7 of the stipulation gives the form that we furnish to members for application for the golf privileges. Has it been customary to require that form to be

signed, or has it been customary to accept an informal notice to that effect?

A. I think that—if a member of the Merion Cricket Club, which entails the privileges of the club-house at Haverford and the other privileges thereunto pertaining wants to become a player at golf under the rules of the club he signs an application or he may simply notify the clerk at the desk.

Q. Yes.

A. To make a memorandum.

Q. Is it the practice of the clerk to get any approval from the Board or the Committee or an officer——

A. No.

Q. —to putting his name on the list?

A. No.

Q. Now, in regard to the termination of the privilege at any time before the end of the year, ——

A. Yes.

Q. —what is the practice of the club in regard to that? Do you require any approval of that termination by a board or a committee or an officer?

A. No, a notice is given to the clerk and he makes a note of it.

Q. Yes.

A. I suppose it might be said that the membership there, with payment of the sum fixed at the end of the year, is because of the great expense of maintaining the golf course.

Q. Yes, in other words, the club wants to know.

A. That is the reason it differs from other fees charged in the club, that is, the fee for billiard table, and fee for bowling alley,——

Q. Yes.

[fol. 45] A. —or the fee for any of the other privileges that are given in the club.

Q. Yes. Now, as to other fees for special privileges, did you prepare a list of those fees?

A. I did.

Q. Is that the list?

(A paper was shown to the witness.)

A. Yes.

By Mr. Evans:

Q. Will you read those through, please?

A. Locker-room five dollars a year.

Use of the skating pond, five dollars a year.
Care of a sedan car in the garage, $22.50 per month.
Sleeping room in the club-house, $55.00 a month.
Use of billiard table, sixty cents an hour.
Use of the squash court, forty cents for forty minutes.
Use of the ballroom, $35.00 for the evening.

Mr. Marran: I would like to object to that as irrelevant, immaterial and incompetent.
The Court: Same ruling.
Mr. Marran: Exception.

By Mr. Evans:

Q. Now, during the period when there was a waiting list for golf privileges——
A. Yes.
Q. —did the club permit the members on the waiting list to play golf upon the payment of a green fee?
A. Precisely as we would permit them to play on a billiard table.
[fol. 46] Q. Yes. Has the Government ever collected the tax on any of these fees for special privileges or on the fees paid by members on the waiting list for golf?

Mr. Marran: Objection.

A. Never to my knowledge.

By Mr. Evans:

Q. In the stipulation the By-laws state that every member is entitled to receive a card of admission from the treasurer upon which shall be printed the privileges of the class of membership to which he belongs. Are those the cards in use for the year 1930?

(The cards were shown to the witness.)

Mr. Marran: 1930 or 1931?
Mr. Evans: 1930.
Mr. Marran: Objection.
Mr. Evans: Well, I will prove that we couldn't——

A. Yes, various types, yes.

By Mr. Evans:

Q. Now, we made a search for a set of 1931 cards and couldn't find them, is that right?
A. Yes.

Q. And these are the same form that have always been used?

A. Same form as we get every year.

Q. Yes.

Mr. Evans: I just call attention to the fact that each card has the privileges of the membership and that it does not state whether or not the member is exercising golf privileges. That is our case.

[fol. 47] Cross-examination.

By Mr. Marran:

Q. Mr. Lesley, I understand you to say that if a member of the golf club wanted to discontinue playing he would just in an informal manner notify the clerk?

A. Right. I want to draw a distinction there, if you will permit me; we don't recognize that as a golf club; it is merely a golf house and a golf course, but it is not a golf club. The Merion Cricket Club is the club which through lease occupies that ground and occupies that house.

Q. But when you say, Mr. Lesley, that in order to terminate the privilege of playing golf all a member has to do is notify the clerk, are you aware of the By-laws that were in effect in 1931 at the Merion Cricket Club?

A. I haven't any recollection of them. If you have got them I will be glad to give them.

Q. Well, there is a section there that says: "Any person so electing to play golf in any year shall be liable for fees for the succeeding year, unless notice of a desire to withdraw shall be given to the Treasurer before December 31st of any year."

A. Yes.

Q. That is a correct statement of the By-laws?

A. That seems to be; it is an informal thing.

Q. You have a lot of members that are called playing members, haven't you, that play golf?

A. Not playing members that play golf.

Q. Well——

A. We have a membership at the Merion Cricket Club where a man is an active or a playing member.

Q. Well, they are called playing members?

A. In that branch of the club.

Q. I see.

A. But they aren't playing members at golf; they have to pay the golf fees which are ratably fixed for the various——

[fol. 48] By the Court:

Q. That word "playing member" has nothing to do with the golf?

A. Not at all, no.

Mr. Marran: Except that is what they are, as playing golf members.

Mr. Evans: No, they aren't allowed to play golf.

The Court: That is the old Cricket Club part of it; I don't think that had anything to do with golf. When they talked about playing, they meant playing cricket.

Mr. Marran: The By-laws provide here, Your Honor, they have a roll of membership in the back of the By-laws, and they give the different keys to membership. Then they have a little asterisk, and it says "Denotes golf privileges". Then when the different members have that asterisk over them, that means they have the golf privilege.

The Court: Yes.

Mr. Marran: Then in all the papers I have seen in the file they will have a bulletin saying, John Smith has transferred from one sort of a member to a playing member.

The Court: That doesn't mean a golf member.

Mr. Marran: If that is really the understanding, I am wrong.

The Witness: That is the understanding.

The Court: Yes, I think you are.

[fol. 49] The Witness: I think the real understanding, I want to be perfectly candid with you, we have so many varieties of sport that the men are grouped, you might say, we talk of the tennis members, and we talk of the golf members, we talk of the hockey members, because those might be called club political associations, or, in other words, we have an annual dinner and we put the golf members here, tennis members there, and the President of the club and the committees have got to know who are the different people forming these different groups, but it hasn't anything to do with the fees they pay, or anything else.

Mr. Marran: I see.

The Witness: Now, the broad policy we have tried to maintain has been that if you are a member of the Merion Cricket Club and paid your dues at the club-house at Haverford and have the facilities there you could play billiards, you could play bowls, you could play squash, and you could have a locker; all those at an extra cost. Now, those you paid without a fixed charge, but when you came to the keeping up of two hundred and fifty acres of golf——

Mr. Evans: Well, Mr. Lesley, I don't think you understand Mr. Marran's point. I think he is mixed up in the playing members.

The Witness: Yes.

By Mr. Evans:

Q. Playing members are defined as those who have all the privileges of senior members except the privilege of the use of the main club-house and golf house?

A. Yes, sir.

Mr. Evans: They are playing members as distinguished from house members, and they are not permitted to play golf.

[fol. 50] The Court: Yes, that is all right.

Mr. Evans: They are the only class of members who cannot play golf.

Mr. Marran: I confess error, then.

Mr. Evans: I think that explains that all right.

By Mr. Marran:

Q. Mr. Lesley, I am correct, though, when I say that if a member exercises the privilege of playing golf he is liable for the full year cost, which is one hundred and ten dollars?

A. If a man applies for the privilege of playing golf by the year——

Q. That is right.

A. —he pays a yearly fee of one hundred and ten dollars. Now, the purpose of fixing a yearly fee there, it may have been bad judgment, was this, that a golf course is a continuing——

Q. Yes.

A. —source of cost, whereas in playing of billiards we charge so much, which goes into the man's monthly ticket, but in golf we have got to maintain the east and west

courses in good order all the year around, and for that reason we don't care to have a man give it up.

By the Court:

Q. Then I understand, in addition to that,——

A. I beg your pardon.

Q. Then I understand that, in addition to that,——

A. Yes.

Q. —an ordinary member of the Cricket Club could play golf by the day on his payment of the daily greens fee, which would be the same as you would charge in case of a stranger who came there as a guest of a member.

A. He can pay, too, so many times in a year.

Q. Pay, too, so many times in a year?

[fol. 51] A. Yes, for instance, a man couldn't avail himself of this daily fee——

Q. That was four times a year?

A. Four times a year. If he had that, they would only avail themselves of it in the spring months or the fall months.

Q. And in addition to that, when the number of your golf playing members was complete and you couldn't take any more, then you allowed your general membership to use that as often as they pleased?

A. Absolutely, on payment of the greens fee.

Q. When there was a waiting list, that applied when there was a waiting list——

A. Absolutely.

Q. —for the golf privileges, that is, the annual golf privileges?

A. Right.

The Court: All right.

By Mr. Marran:

Q. When there was a waiting list, Mr. Lesley, wasn't it so that all members exercising golf privileges could not give them up unless they had another member that would step in and take their place——

A. Oh, no.

Q. —during the year?

A. No, no, never had such a rule. The desire to play golf was so great at one time that people would buy shares in the golf association.

By Mr. Evans:

Q. They never could give up the privilege——

A. Oh, no.

Q. —during the year unless there was a member on the waiting list prepared to take it up?

Mr. Marran: That is what I asked.

[fol. 52] Mr. Evans: I don't think he understood your question.

The Witness: You used the word, unless they presented a member.

Mr. Marran: Oh.

The Witness: There is no relation between the member who comes in and the member who goes out.

Mr. Marran: That is all.

By the Court:

Q. Well, suppose a time when you had a waiting list,——

A. Yes.

Q. —and one of those members wanted to quit playing golf or gave it up, we will say on the first of February,——

A. Yes.

Q. —and he had only acquired his privilege as of the first of January and wanted to give it up the first of February, and you had a waiting list, what would he do?

A. He would have to resign and pay the year's dues.

Q. That is all he could do?

A. That is all he could do.

Q. Then you would elect a new——

A. New member.

Q. Give the same privileges to somebody in his place?

A. Somebody else.

Q. So for that particular vacancy you would get two years' dues?

A. Right.

Mr. Evans: I don't think Mr. Lesley understood your question.

The Court: Well, I tried to make it clear.

[fol. 53] Redirect examination.

By Mr. Evans:

Q. Mr. Fahnestock's resolution provided, didn't it, when there was a waiting list if the member exercising golf privileges desired to stop in the year and there was a man on the

waiting list who desired to take his place, he could stop and his fees were prorated and refunded?

A. Well, I am perfectly frank to say, when the thing was so complicated, with members coming in and members wanting to get in, I know there was a resolution passed——

The Court: Well, that is in the stipulation.
Mr. Evans: That is in the stipulation.
The Court: All right.
The Witness: If there is a stipulation, it is there.
The Court: All right.
Mr. Marran: That is all, Mr. Lesley.
Mr. Evans: That is all, Mr. Lesley.

Plaintiff Rests

Defendant's Evidence

Mr. Marran: The Government for its defense wants to offer in evidence all the remaining facts in the stipulation as filed with the Clerk not already introduced by the attorney for the plaintiff.

Mr. Evans: I would like to record an objection to paragraph 22, which is the resolutions——.

[fol. 54] The Court: Well, I will take it subject to the objection.

Mr. Marran: Yes, all right.

(Paragraphs 18 to 23 of the stipulation of facts read:

"18. A true copy of plaintiff's application for membership in the Merion Cricket Club, marked Exhibit 1, is attached hereto and made a part hereof. Plaintiff, received a letter from the said Club dated September 24, 1919, a copy of which is hereto attached, marked Exhibit 2, and made a part hereof. Also a true copy of letter transmitted by plaintiff to the said Club under date of October 1, 1919, is attached hereto, marked Exhibit 3, and made a part hereof."

* * * * * * *

"19. A booklet was issued by the Club in 1917, containing a copy of the charter, by-laws, and house rules of the Club as they existed at the time of plaintiff's election to membership. Said by-laws provided for various classes

of memberships, including family membership. The entrance fee for a family membership was $100; the annual dues, $55. Said by-laws also provided for the payment of 'further dues' for the privilege of playing golf. Said 'annual dues for golf privileges' in the case of persons holding family memberships were:

Men over 23 years of age	$55.00
Men over 21 to 23 years of age	27.50

Both annual and golf dues were payable in equal installments on the first day of January and July of each year.

"20. Beginning with December 1, 1923, the by-laws of the Club, in addition to providing for the payment of 'annual dues for golf privileges', provided for the payment of a 'golf entrance fee' by persons obtaining said golf privileges as follows:

[fol. 55] A golf entrance fee of one hundred dollars shall be payable when any man over 23 years of age or any Non-Resident Member shall be admitted to the exercise of golf privileges: Provided, That the golf entrance fee shall not be payable by any person who is a member of the Club at the time of the adoption of this amendment to the By-Laws, December 1, 1923, and who has remained a member continuously until the date of his obtaining golf privileges.

"21. The 1917 by-laws of the Club, Article I, Section 2, paragraph 3, provided with respect to withdrawal from the golf privileges as follows:

Members of the Club and women having the privileges of the Club desiring to play golf, shall pay, in addition to the other dues or sums for which they are annually liable further dues for the privilege of playing golf; and in case of non-payment of the same, such persons shall be subject to the same penalties as provided for the non-payment of any other dues. Any person so electing to play golf in any year shall be liable for dues for the succeeding year, unless notice of a desire to withdraw shall be given to the Treasurer before December 31st of any year.

Said paragraph 3, Section 2, Article I, was carried without change into each succeeding edition of the Club's by-

from 1929 to 1931 the word 'dues' occurring in lines 4 and 9 of said paragraph, above quoted, was changed to 'fees'.

"22. The Board of Government of the Club on June 22, 1921, adopted the following resolution:

Upon motion of Mr. Fahnestock, duly seconded, the following preamble and resolution were adopted:

Whereas there is now a long list of applicants for golf privileges awaiting vacancies in the golf membership and a [fol. 56] number of members now holding golf privileges have signified their willingness or desire to surrender their golf privileges, thus creating vacancies which can be filled by members on the waiting list; and

Whereas it is the opinion of the Board that it is desirable to grant golf privileges to members applying for the same as speedily as can be done consistently with the avoidance of over-crowding the courses and no good purpose is to be served by retaining on the list of those having golf privileges members who do not desire to avail themselves of such privileges and thus retain their privileges to the exclusion of those who do desire to avail themselves thereof.

Resolved that the Secretary be and he is hereby authorized at any time to accept the surrender of golf privileges by any member tendering such surrender and the Treasurer be and he is hereby authorized to remit the fees of any member the surrender of whose privileges is so accepted, on a pro rata basis for the unexpired portion of the current period, provided there is at the time of such surrender another member of the Club in good standing on the waiting list for golf privileges ready and willing to accept such privileges and to pay the regular charges thereof for the unexpired balance of such term; and Provided further that any vacancy so created shall be filled by the first member on the waiting list who shall be ready and willing to fill the same.

The resolution of June 22, 1921, quoted above, was modified by a resolution adopted by the Board of Government on February 24, 1932, which reads as follows:

The Secretary called attention to the minute adopted June 22, 1921, authorizing the acceptance of golf membership resignations at any time during the year, provided there is

at the time another member on the waiting list ready im-
[fol. 57] mediately to fill the vacancy. As, at the present time, there is no golf waiting list the Board agreed that, as the fees for golf privileges are annual fees the same as Club dues, the member asking to resign should be required to pay his golf fees to the end of the year, until such time as there may be again a golf waiting list.

"23. Members admitted to golf privileges are liable to the Club for the full annual fee, except when admitted after July 1st. Except as provided in the Resolution quoted in Paragraph 3 of this Stipulation, it has not been the policy of the Club to make any refunds of or to release a member from the second semi-annual installment of the golf fee. On very rare occasions the Club has released a member from paying the second semi-annual installment where the reasons advanced by the member have been unusual. No refunds of amounts paid by the members for the privilege of playing golf are made under any circumstances."

* * * * * * *

Opinion in Habdt v. McLaughlin Filed January 14, 1936

Kirkpatrick, J.:

This suit was brought to recover the sum of $5.50, paid by the plaintiff as club dues tax for the calendar year 1931. The Revenue Act of 1928, Sec. 501(a)(1) and (d) applies. The trial was to the Court without a jury. A stipulation of facts was entered into, which is adopted by the Court as special findings of fact. In addition testimony was taken from which additional facts will be found.

The question involved is whether annual charges paid by members of the Merion Cricket Club to the Club for the privilege of playing golf on the club course are "dues" within the meaning of the Act.

[fol. 58] There are three reported decisions dealing with the question. They are Weld v. Nichols, 9 Fed. (2d) 977 (D. C. Mass.); and Baltimore Country Club v. United States, 7 Fed. Sup. 607 (D. C. Md.); which held similar payments not taxable, and Foran v. McLaughlin, 59 Fed. (2d) 158 (C. C. A. 9), which held them taxable. The intricacies of club organizations and the variety of membership distinctions will naturally lead to differing results in applying a general rule to particular cases. But I do not think that

these decisions disclose any real difference of judicial opinion as to the rule which governs and the test to be applied.

We start with the proposition that membership in any club involves certain basic payments (usually annual) which, at the least, give rights of ownership in the club property and in the government of the organization. In addition, most clubs provide various facilities and services, which some members will want to use and which others will not. Those who do almost always have to pay something for them in addition to their regular club dues. The rights thus obtained vary widely in kind and degree, ranging from those which involve practically nothing beyond the services of an attendant furnished by the club, such as having a car washed in the club garage or use of the club barber shop, to those which carry the privilege of using substantial portions of the club property, often representing a large permanent investment and rather definitely set apart and segregated as to upkeep and management, for example, a golf course with a separate golf club house where meals are served and bedrooms are to be had. Intermediate between these two extremes are a great variety of privileges not easy to classify and not necessary to consider in this case, involving the use of parts of the club equipment adapted to particular games or activities, such as the billiard tables, swimming pools, cards and card tables, squash courts, tennis courts and skating pond.

Of course, charges of fifty cents or a dollar for car washing or a pack of cards or the use of a billiard table [fol. 59] are not club dues in any sense of the word. The plaintiff argues that there is no substantial distinction between such payments and the yearly charge for golf privileges, involved in the suit. We turn to the cases for the guide.

Judge Morton in Weld v. Nicholas, the first of the three cases referred to above, proposed a test which he derived from reading clause (a) in connection with the last sentence of clause (b) which I think is entirely sound and satisfactory. He says the words " 'dues or membership fees,' in clause (a), were meant to cover only fixed and definite charges applicable to all members of each particular class of membership."

The Baltimore Country Club case expressly approved and adopted this test. I do not think that either what was decided or what was said in the opinion in Foran v. Mac-

Laughlin was in conflict with this. That opinion approaches the question from a slightly different angle and stresses the "recurring contractual" nature of the obligation but it really comes down to the same thing. When a club member, in order to exercise certain privileges and use certain club facilities in connection with them, assumes a binding obligation to pay a fixed definite charge, which obligation extends over a considerable period of time and will be automatically renewed until he withdraws from his preferred position as a user of the privileges in question (a "recurring contractual obligation"), he really has become one of a particular class of club members. That is, if we look at the substance of the thing and not at the terminology used in the by-laws, resolutions, notices and the like, and I think that everyone will agree that the form should not control the actuality.

In the case at hand it is true that the by-laws divide the Merion Club membership into nine classes, and that golf-playing members are not mentioned in the classification as distinct from any other class, but I cannot see any reason why members who have acquired the right to play golf on the club links — a right which club members do not have by virtue of their membership — by paying a regular [fol. 60] additional annual assessment are not just as much a class of members as those, say, who by paying more than the minimum regular dues get the right to have admission cards issued to the ladies of their immediate families which entitle the ladies to all the privileges of the grounds and the main club house ("family members" in the classification made by the by-laws).

There is no question about the binding nature of the obligation assumed when a member applies for and is granted a golfing status. If this occurs before January 1st he is obligated to pay $110 in two installments on the first of January and the first of July. If he plays six months and wishes to give up golf on the first of July he cannot avoid liability for the second installment unless there happens to be a waiting list for golf privileges and the Club chooses to relieve him and accept someone else in his place. Unless he notifies the Club before December 31st he will be automatically liable for another year's golf fees. This is exactly the same provision as applies to the regular membership dues, and resignations from the Club itself must

be presented before December 31st or else another year's liability will be incurred.

If he fails to pay the golf fees and continues in such default after being duly posted he loses not only the right to play golf but membership in the Club, because the by-laws provide that "in case of nonpayment * * * such persons shall be subject to the same penalties as provided for the nonpayment of dues."

Only a limited number of members may be admitted to yearly golf privileges and a regular waiting list is maintained for excess applications. As I understand the testimony, though it is not very clear and may not be of great importance, the rule has been that if the golfing quota was not full, club members generally were permitted to use the course only four times a year upon paying a daily greens fee, the only difference between them and non-members being that the latter had to be introduced as a guest of a [fol. 61] member. When the quota was full and there was a waiting list, club members were allowed to play as often as they pleased at the daily rate.

The plaintiff agrees that the test laid down by Judge Morton and stated above is the correct rule. His argument that it does not apply to him comes down in effect to the point that there is no class of golfing members eo nomine. If the form is to control he is right. If the substance, I think he is wrong.

I find as a fact that the plaintiff's payment of $5.50 which is the subject of this suit was a charge applicable to a particular class of members.

The plaintiff's requests for conclusions of law are denied. The defendant's requests for conclusions of law are all affirmed.

I find a verdict for the defendant and judgment may be entered thereon.

Defendant's Exhibit B

Extracts From By-Laws

Defendant's Exhibit "B", "The Merion Cricket Club 1931", pp. 41 and 43.

Art. II, Sec. 3. When the annual dues or fees or any portion thereof or a closet rent of any member or other

person having Club privileges shall remain unpaid for a period of two months after they are due the Treasurer shall send a notice to the delinquent, stating that if the same are not paid within one week thereafter his name with the amount due will be posted in the Club Houses and that he will be deprived of all Club privileges and of the use of the houses and grounds during the period of such posting and that unless the same are paid within two weeks after the date of such posting his membership shall cease. In case such indebtedness be not paid pursuant to such notice, the person in default shall thereupon cease to be a member of the Club and shall forfeit all his interest in the property of the Club, real and personal. Should he, however, explain [fol. 62] his default to the satisfaction of the Board of Government, and make payment, the Board shall have the power to reinstate him to membership. * * *

Art. II, Sec. 4. Accounts shall be kept of House and Garage charges and of items other than dues, fees and closet rents, and shall be rendered monthly. If an account shall remain unpaid for a period of one month from its date the Treasurer shall send a notice to the delinquent, stating that if the same is not paid within one week thereafter his name with the amount due will be posted in the Club Houses and that he will be deprived of all Club privileges and of the use of the houses and grounds during the period of such posting and that unless the same is paid within two weeks after the date of such posting his membership shall cease. In case such indebtedness be not paid pursuant to such notice, the person in default shall thereupon cease to be a member of the Club and shall forfeit all his interest in the property of the Club, real and personal. Should he, however, explain his default to the satisfaction of the Board of Government, and make payment, the Board shall have the power to reinstate him to membership. * * *

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed December 11, 1939

This case having been tried before the Court without a jury and counsel for the plaintiff having introduced the

record in the case of Hardt v. MacLaughlin, No. 16376, which record was accepted in evidence by the Court and which record contains a stipulation of facts entered into by and between counsel for the parties, which stipulation was adopted by the Court in Hardt v. MacLaughlin as its special findings of fact, the defendant therefore requests the Court [fol. 63] to find the facts as stipulated in the record in the case of Hardt v. MacLaughlin, together with the additional facts found by Judge Kirkpatrick in his opinion in the case of Hardt v. MacLaughlin, and the following conclusions of law:

I

That the taxes sought to be recovered in this action were lawfully assessed and legally collected by the defendant from the plaintiff.

II

That the complaint sets forth no facts which are sufficient to entitle the plaintiff to recover in this action.

III

That the amounts paid to the Merion Cricket Club for the privilege of playing golf during the period involved were dues within the purview of Section 413 of the Revenue Act of 1928.

IV

That the Commissioner of Internal Revenue properly disallowed plaintiff's claim for refund for club dues taxes assessed and paid for the period involved.

V

That under the law and the evidence the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

VI

That on the pleadings, the stipulation of facts and the evidence in this case defendant is entitled to judgment, together with costs.

J. Cullen Ganey, United States Attorney.

[fol. 64] IN UNITED STATES DISTRICT COURT

OPINION—Filed January 26, 1940

KALODNER, J.:

The plaintiff, a social, athletic, and sporting club, located at Haverford, Pennsylvania, is a non-profit corporation organized under the laws of the State of Pennsylvania. The plaintiff owned and operated two eighteen-hole golf links, and its by-laws provided that members who desired to play golf might obtain the privilege of doing so by the payment of a special annual golf fee. The plaintiff also owned other grounds and buildings, and it furnished numerous social and athletic facilities to its members, in consideration of the payment of the regular club dues. Certain of the facilities were furnished without special charge, and for other facilities—for example, golf—special fees were charged, in addition to the club dues.

The instant proceeding was brought by the plaintiff to recover certain taxes which it collected from its members and paid to the Collector of Internal Revenue—the taxes being ten per cent of the fees paid by members of the club for the privilege of playing golf. The ten per cent tax was collected by the club and paid over to the Collector of Internal Revenue in accordance with the provisions of the Revenue Act of 1928, Act May 29, 1928, C. 852, Sec. 413, 45 Stat. 864, U. S. C. Title 26, Sec. 950 (1).

Judge Kirkpatrick of this Court, in Hardt v. MacLaughlin, No. 16376, a suit brought by one of the members of the plaintiff club to recover the tax which he had paid on his golf fees, ruled that annual charges paid by members of the club for the privilege of playing golf are "dues" within the meaning of the Act of 1928, supra.

(1)

"Sec. 950. Tax—(a) Rate.

"There shall be levied, assessed, collected, and paid—
[fol. 65] "(1) Dues or membership fees. A tax equivalent to 10 percentum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year."

The instant case was tried before the Court without a jury. Counsel for the plaintiff introduced the record in the case of Hardt v. MacLaughlin, supra, which record was accepted in evidence by the Court. The record contains the stipulation of facts entered into by and between counsel for the parties, which stipulation was adopted by the Court in Hardt v. MacLaughlin as its special findings of fact.

The issue involved in the present proceeding was exhaustively reviewed by Judge Kirkpatrick in Hardt v. MacLaughlin, and his ruling in that case is dispositive.

FINDINGS OF FACT

I find the facts as stipulated in the record in the case of Hardt v. MacLaughlin, together with the additional facts found by Judge Kirkpatrick in his opinion in that case.

CONCLUSIONS OF LAW

(1) The taxes sought to be recovered in this action were lawfully assessed and legally collected by the defendant from the plaintiff.

(2) The complaint sets forth no facts which are sufficient to entitle the plaintiff to recover in this action.

(3) The amounts paid to the Merion Cricket Club for the privilege of playing golf during the period involved were dues within the purview of Section 413 of the Revenue Act of 1928.

(4) The Commissioner of Internal Revenue properly disallowed plaintiff's claim for refund for club dues taxes assessed and paid for the period involved.

[fol. 66] (5) Under the law and the evidence the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

(6) On the pleadings, the stipulation of facts and the evidence in this case defendant is entitled to judgment, together with costs.

Accordingly, I find a verdict for the defendant and judgment may be entered thereon.

In United States District Court

Motion for Judgment—Filed December 11, 1939

Now this 11th day of December, 1939, comes the defendant by J. Cullen Ganey, United States Attorney for the Eastern District of Pennsylvania, its attorney of record, and after the close of all the evidence, and respectfully moves the Court for judgment in favor of the defendant and against the plaintiff on the following grounds:

I

That the taxes sought to be recovered in this action were lawfully assessed and legally collected by the defendant from the plaintiff.

II

That the complaint sets forth no facts which are sufficient to entitle the plaintiff to recover in this action.

III

That the pleadings and the evidence in this case, with every inference of fact that may be drawn therefrom, are insufficient at law to warrant a judgment against the defendant.

[fol. 67] IV

That on the pleadings and the evidence in this case defendant is entitled to judgment dismissing plaintiff's complaint at plaintiff's cost.

Respectfully submitted, J. Cullen Ganey, United States Attorney.

In United States District Court

Judgment—Filed January 26, 1940

Before Kalodner, J.:

And Now, to wit: January 26, 1940, in accordance with the findings and verdict, it is Ordered that Judgment be and is hereby entered in favor of Defendant, The United States, and against Plaintiff, Merion Cricket Club, with costs.

By the Court, Attest: Gilbert W. Ludwig, Deputy Clerk.

[fol. 69] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1940

No. 7441

MERION CRICKET CLUB, Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, Defendant-Appellee

And afterwards, to wit, the 19th day of November, 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of March, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 70] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1940

No. 7441

MERION CRICKET CLUB, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed March 28, 1941

Before Maris, Clark and Jones, Circuit Judges

CLARK, Circuit Judge:

Some, at least, of the "leisure activities" said to be characteristic of a club[1] seem to have been devoted to tax liti-

[1] Clubs, 3 Ency. of the Social Sciences, pp. 573-577.

gation. So we find the member-taxpayers taking a broad view of the scope of "pleasure, recreation, etc."[2] and a narrow view of the meaning of "initiation fees" and "membership dues and fees". They first whittled at initiation fees,[3] Next, they succeeded in exempting assess- [fol. 71] ments.[4] Clubs responded to this by lowering dues and increasing assessments. So the device did not affect their economy, but did effect a tax saving. Congress naturally plugged both leaks.[5]

The principal case is one of a series arising out of their third move. Having failed to tip the anti-tax balance by calling dues assessments, they now wishfully call them "commuted greens fees". In other words, the general dues are still lowered but the resulting deficit is met by the creation of a "playing" membership. We may say that this second method of distributing operating costs has received the cooperation of considerable judicial hair-splitting. There are many decided cases and they may be found collected in 13 Words & Phrases 599 and (Supp.) 33 and 3 Prentice-Hall Federal Tax Service, 1940, Para. 29,544, and cited and discussed in two excellent law review notes.[6]

It is clear that Congress might well have taxed my payments to clubs. Such an excise would be the simplest kind of a tax on the sale of luxuries.[7] On a principle of

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[2] Internal Revenue Code, 26 U. S. C. A. 1940 ed. § 101 (9); What is a social club within statute imposing tax on dues or membership fees, 80 A. L. R. 1296; Construction and application of provision of income tax statutes exempting clubs, 130 A. L. R. 107; Taxation of Individuals as Members of Social Clubs, 26 Virginia Law Review 941 (note), subheading, Social, Sporting or Athletic Club?, at p. 942.

[3] Masonic Country Club v. Holden, 18 F. (2d) 553.

[4] Garden City Club v. Corwin, 62 (2d) 246. Cf. Fresh Meadow Country Club v. U. S., 17 F. Supp. 400, 401.

[5] Internal Revenue Code, 26 U. S. C. A. 1940 ed. § 1712 (a) and § 1712 (b).

[6] Taxation—Federal Excise Tax on Club Dues or Membership Fees, 24 Minnesota Law Review 713 (note); Taxation of Individuals as Members of Social Clubs, 26 Virginia Law Review 941 (note).

[7] Green, Theory and Practice of Modern Taxation (2d ed. 1938) 196.

de minimis and probably to save accounting intricacy, it selected the larger and more easily detectable. These are: "initiation fees", "assessments", and "membership dues and fees". As the term "dues" has been long in use in this country (the corresponding word in England is "subscription" [8]), it might well be said to have acquired a "trade usage". So testimony on that meaning might have been offered.[9] It has not been presented either to us or, so far as we know, to any other court. We think, however, that it sufficiently appears from the "common ground" of the [fol. 72] sociological and legal structure of social clubs. The latter has been adverted to in the text books and essays.[10]

The name itself is significant. It derives from the Anglo-Saxon "cleofan" and indicates a division of the reckoning.[11] The theory is one of joint expenditure.[12] Some clubs carry this theory to its logical conclusion and divide the entire cost of running the club among the whole membership. The glutton and toper eat and drink at the expense of their more abstemious brethren. The more athletic or enthusiastic golfer lives off his weaker or less zealous colleagues. Most clubs, however, do not carry this companionship idea to such lengths of sharing. They except and apportion to the particular recipients certain supplies and services. What remains comes from the members generally and the names and forms of their payments have always been those of "initiation fees" and "dues". It behooves us, then, to examine the basis of the difference and so to determine the distinction.

[8] Wise v. Perpetual Trustee Co., 1903 A. C. 139, 149; Carlisle and Silloth Golf Club v. Smith, 1912, 2 K. B. 177, 189-190; aff'd. 1913, 3 K. B. 75, 82-83.

[9] 7 Wigmore on Evidence (3d ed.) § 1955; 9 Wigmore on Evidence (3d ed.) § 2556.

[10] "It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy."

4 Amer. Jur. p. 457.

See also Escott, Club Makers and Club Members.

[11] "The word signifies uniting to divide", Timbs, Clubs and Club Life in London, p. 2.

[12] Timbs, above cited, p. 4.

Club facilities may be for common and repeated use or they may be for single and individual enjoyment. It is possible, although difficult, and may be unjust cost accounting (i. e. per divot) to divide that common use among the users. Such a division overlooks one element. The facility must be available irrespective of use (this applies to certain categories, perishables for instance, of the individual and single). For that reason, the apportionment must be general and cannot be allotted. A golf course is just as typical as a club-house. You consume a drink and you enjoy the special attention of a caddy, but you share the use of fairways that always await anxiously for your drives.

[fol. 73] The argument for the "commuted green fee" is then an attempt to extend a false analogy by disguised phrasing. The green fee is not an attempt to charge the appropriate fraction of a general cost. It is an arbitrary amount billed to non-members for the privilege of playing. Its character has been well described by a judge speaking in the home of golf. He says:

"* * * The revenue of the committee is to consist—in addition to a fixed contribution of 6s. per member payable by the golf clubs and a similar fixed charge payable by residents who use the links for playing golf—of fees levied on visitors and members of the general public who use the links for the game."

Carnoustie Golf Course Committee v. Commissioners of Inland Revenue, 1929 S. L. T. 366, 368-369.[13]

It is, in fact, more closely related to calendar than to cost.[14] Obviously nothing is added to an inaccurate description by the application of the common term for a collective payment.

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[13] Cf.:

"* * * It is said that the green fees alone would not nearly keep up the course and the club-house which the visitors enjoy, nor would the members' subscriptions without the visitors' green fees keep up the course and the club-house; that in either of those aspects the club would every year have a heavy deficit. By combining the two there is a less deficit, though there is still a deficit, because the difference between the receipts and expenditure has to be made good by members' subscriptions. Carlisle and Silloth Golf Club v. Smith, 1912, 2 K. B. 177, 189-190.

[14] It is common knowledge that most golf clubs scale their green fees according to the probabilities of congestion.

The cases have attempted a further confusing refinement. They suggest some budgeting principle. It is easier to run a club, or anything else for that matter, if one can dispense with prophecy. The courts have allowed this greater ease to assist not only the managers but the taxpayer-members, and have made exemption turn upon recurring certainty.[15] Such a view lacks logic. The budget would be even more [fol. 74] assisted by life memberships or by deposits to cover the purchase of consumables. Furthermore, the club with the best crystal-gazers or the most loyal members would escape the most taxes. In point of fact, the principal case falls inside even the questioned classification.

The judgment of the District Court is affirmed.

JONES, Circuit Judge, concurring:

In concur in the affirmance of the judgment below for the defendant. The learned trial judge, before whom the case was tried without a jury, based his action upon a ruling of the same court in Hardt v. McLaughlin, 25 F. Supp. 684, where the material facts involved were precisely the facts of the instant case.

The opinion in the Hardt case correctly construed the pertinent provision of the Revenue Act [1] with respect to the tax on club "dues or membership fees" and applied the statute to a proper appraisal of the character of the payments made by the club members for golf privileges. The payments were made in discharge of a yearly obligation (payable semiannually) which recurred so long as the member chose to enjoy, by failing to renounce prior to December 31st, the golf privileges for the ensuing year and in a sum arbitrarily fixed by the club without regard to whether the privileged member used the golf facilities much, little, or not at all. The charges were dues or membership fees in the ordinary acceptation of those terms and, therefore,

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[15] Contrast: Winchester Country Club v. White, 30 F. Supp. 142, aff'd, 117 F. (2d) 146; Philadelphia Cricket Club v. U. S., 30 F. Supp. 141; Foran v. McLaughlin, 59 F. (2d) 158, cert. denied, 287 U. S. 637; Hardt v. McLaughlin, 25 F. Supp. 684.

[1] Sec. 413 of Revenue Act of 1928, c. 852, 45 Stat. 791, 26 U. S. C. A. Int. Rev. Acts p. 441.

within the intent and meaning of the statute. In that situation, the club's by-laws and regulations, even though promulgated long before the enactment of the particular Revenue Act, are ineffectual to exclude the payments from the purview of the tax statute.

[fol. 75] The case of White v. Winchester Country Club, 117 F. 2d 146 (C. C. A. 1), takes away nothing from the decision in the Hardt case. The opinion in the White case expressly points out (p. 148) that there the privileges "could be taken and dropped informally at pleasure" as distinguished from the "recurring contractual obligation" in the Hardt case, whose pertinence to the facts of the present case has already been pointed out.

MAHS, Circuit Judge, dissenting:

I regret that I cannot concur in the conclusion reached by the court in this case. The question before us is whether annual golf fees collected by the Merion Cricket Club from those of its members who desire the privilege of playing golf on the club's courses are taxable under Section 1710 of the Internal Revenue Code (26 U. S. C. A. § 1710) as amounts paid "as dues or membership fees to any social, athletic, or sporting club." The Merion Cricket Club is a social and athletic club. It has ten classes of membership and for each class membership dues are fixed by the by-laws. Members of all the classes, except Playing Members (who do not have golf privileges), are given the privilege of playing golf for an annual fee, payable in semi-annual installments. The fees vary from $30 for members under 21 to $110 for male members over 21 and its amount does not depend on the class of membership to which the member belongs. The golf privilege can be terminated by notice before the end of any year. If not so terminated the member becomes liable for another year's fee. This method of charging members for the privilege of playing golf has been in effect since 1896.

The question turns upon the meaning to be given to the statutory terms "dues or membership fees." While these are words in common use and are not defined in the statute a number of federal courts have had occasion to consider [fol. 76] them and have indicated some limits to their meaning. Thus to be club dues or membership fees it has been held that payments by club members must be based upon membership in the club and must be payable by all the mem-

bers of a particular class of membership, not merely by those of the class who elect to make use of a special club facility. Weld v. Nichols, 9 F. 2d 977; Baltimore Country Club v. United States, 7 F. Supp. 607; Williamson v. United States, 12 F. Supp. 26; Philadelphia Cricket Club v. United States, 30 F. Supp. 141. Then also, they must represent a recurring, contractual obligation extending over an indefinite period of time. Foran v. McLaughlin, 59 F. 2d 158, cert. den. 287 U. S. 687.

The golf fees involved in this case do not meet these tests. They are not incident to any class of membership. On the contrary they are payable only by those members, of whatever class, who desire to make personal use of the golf facilities of the club. Nor are they indefinitely recurring obligations. While annually renewable in the absence of notice, the accrual of the obligation is entirely within the individual member's power. If he does not wish to make use of the golf facilities in the new year he may by notice to that effect divest himself of all responsibility for future golf fees. This, it seems to me, is inconsistent with the statutory concept of dues and membership fees.

In White v. Winchester Country Club, 117 F. 2d 146, the Circuit Court of Appeals for the First Circuit, upon facts substantially similar to those here involved, reached the conclusion that annual payments to a country club for golf privileges were not taxable as "dues or membership fees." That conclusion is in accord, as I have indicated, with the views of all the courts which have considered the subject except the court below in the present and a prior related case (Hardt v. McLaughlin, 25 F. Supp. 684). The case of Foran v. McLaughlin, supra, upon which the government relies, is not to the contrary, for the monthly greens fees held taxable in that case were a recurring con-[fol. 77] tractual obligation of those members of the Olympic Club who joined the class of Contributing Members which obligation extended over an indefinite period of time regardless of the members' desire to use the greens. They were obligations incidental to the class of membership and were, therefore, properly taxable as membership fees.

The golf fees of the Merion Cricket Club which we are considering were provided for in 1896, long before any tax on club dues was proposed. Neither tax evasion nor avoidance is involved. Being convinced that these fees are charges for the personal use of a special facility of the club

and that they are not membership fees I cannot agree that the judgment holding them to be taxable as the latter should be affirmed.

A true Copy. Teste:

_____, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 78] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7441

Merion Cricket Club, Appellant,

vs.

United States of America, Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

March 28, 1941.

William Clark, Circuit Judge.

Endorsements: Order Affirming Judgment. Received & Filed Mar. 28, 1941. William P. Rowland, Clerk.

[fol. 79] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and pro-

ceedings in this court in the case of Merion Cricket Club, plaintiff-appellant, vs. United States of America, defendant-appellee, No. 7441, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of April in the year of our Lord one thousand nine hundred and forty-one, and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 78] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. 1047

MERION CRICKET CLUB

vs.

UNITED STATES

STIPULATION IN RE RECORD

It is hereby stipulated by counsel for the parties in the above entitled case that for the use of this Court in considering the petition for a writ of certiorari, the printed record shall consist of the proceedings in the Circuit Court of Appeals for the Third Circuit and Part I of the Appendix to the petitioner's Brief and Appendix filed in that Court.

And it is further stipulated that if the petition for a writ of certiorari is granted, the record now in this Court shall be printed under the supervision of the Clerk of the Supreme Court for consideration of the case on the merits, and shall include the following portions of the certified copy of the record in the Circuit Court of Appeals now on file in this Court—Part I of the Appendix to Appellant's Brief and the proceedings in the Circuit Court of Appeals.

John Lewis Evans, Counsel for Petitioner. Francis Biddle, Solicitor General (A. Q.), Counsel for Respondent.

[fol. 79] [Endorsed:] No. —. October Term, 1940. In the Supreme Court of the United States. Merion Cricket Club vs. United States. Stipulation in re Record. John Lewis Evans, 1930 Land Title Building, Philadelphia, Pa.

[fol. 79] SUPREME COURT OF THE UNITED STATES

No. 83, October Term, 1941

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.